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No. 87-1120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,
a Colorado corporation,

Appellant,

v.

THE CITY OF GREELEY, COLORADO,
a municipal corporation,
and HOME LIGHT AND POWER COMPANY,
a Colorado corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO DISMISS

KENNETH L. STARR
Counsel of Record
HOLMES & STARR
A Professional Corporation
717 17th Street, Suite 2440
Denver, CO 80202
(303) 292-1500

Of Counsel
RANDOLPH W. STARR
RANDOLPH W. STARR, P.C.
221 East 29th Street, #220
P.O. Box 642
Loveland, CO 80539
(303) 667-1029

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SUMMARY OF ARGUMENT

Poudre Valley Rural Electric Association, Inc. ("Poudre") timely raised its Federal Constitutional defenses below, and Public Service Company of Colorado's ("Public Service") argument in its Motion to Dismiss that Poudre abandoned its defenses is based on citations of inapplicable authorities, unsupported assertions and misleading and out of context quotations from Poudre's Brief on Appeal before the Colorado Supreme Court ("Poudre's Brief on Appeal"), rather than the "record as a whole."

Public Service's arguments on the merits ignore controlling decisions of this Court.

The City of Greeley ("Greeley") concedes in its Motion to Dismiss that Poudre is entitled to its "day in court" on its unresolved defenses and, accordingly, should have no objection to a remand for a consideration by the Colorado District Court of these issues.

ARGUMENT

I. POUDRE TIMELY RAISED ITS FEDERAL ISSUES BELOW.

> It is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, "[n]o particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Pruneyard Shopping Center v. *Robins*, 447 U.S. 74, 85 n.9, 100 S. Ct. 2035, 2043 n.9, 64 L.Ed.2d 741, 755 n.9 (1980), quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184, 187 (1928) (emphasis added).

At page 3 of its Motion to Dismiss, Greeley concedes that Poudre properly raised its unresolved defenses. Public Service also concedes (at page 7 of its Motion to Dismiss) that the defenses reproduced at A56-58[1] were properly raised, but asserts that Poudre "did not press any of those federal constitutional defenses in the trial court." That statement is not only unsupported, but could only be made by someone, like each of Public Service's counsel before this Court, who did not participate in the proceedings before the Colorado District Court.

At pages 11 through 14 of Poudre's Jurisdictional Statement, Poudre demonstrated in detail that the record as a whole shows Poudre raised its defenses below in a timely fashion. Not only were each of Poudre's Federal Constitutional defenses raised in Poudre's Answers, but these defenses were preserved as issues for trial in Poudre's Pretrial Statement filed pursuant to Section 1-18 of Colo.R.Civ.P. 121, which was then incorporated by reference in the Pretrial Order (Vol. 3, p. 856).[2] Moreover, on the sixth and last day of trial, the District Court permitted Poudre to answer Greeley's Amended Complaint by incorporating by reference its previous Answer as well as the arguments it had raised in its Motion to Dismiss the Amended Complaint (Vol. 10, p. 69). As described in detail at pages A56-58, the previous Answer raised the federal issues which are now before this Court.

The substantial evidence in the record to support Poudre's defenses, which Poudre summarized in its Jurisdictional Statement, also shows that Public Service is simply not being candid when it asserts that these defenses were not pressed at trial. Public Service's argument appears to be based on nothing more than the fact that, because the District Court ruled in Poudre's favor on other grounds, these constitutional

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1. Citations to the separately paginated appendices to Poudre's Jurisdictional Statement are in the form of "A____."

2. Record references are to the volume and page number of the record before the Colorado Supreme Court, *e.g.*, Vol. ____, p. ____.

issues were not reached by the District Court under the well-settled principle "that a court will not rule on a constitutional question that is not essential to disposition of the case before it." *Mountain's Shadow Inn, Inc.* v. *Colorado Dep't of Labor*, 672 P.2d 522, 525 (Colo. 1983). *See also* Greeley's concession at page 3 of its Motion to Dismiss that "a determination on the issues upon which Poudre now seeks review was not necessary at the trial court level."

Public Service's argument that Poudre failed to preserve its unresolved defenses on appeal is equally flawed. In addition to totally misrepresenting what was said in Poudre's Brief on Appeal, Public Service's argument overlooks the fact that Poudre's "Conclusion" in its Brief on Appeal before the Colorado Supreme Court was not an attempt to raise issues on appeal, but rather reminded the Colorado Supreme Court of the procedural posture of the case, *i.e.*, that there were substantial unresolved issues not reached by the District Court which would need to be addressed by the District Court on remand if the Colorado Supreme Court did not affirm the District Court's judgment.

Moreover, it cannot be contended that Poudre (which was an Appellee) failed to preserve issues on appeal. Poudre, who prevailed below on the issue of whether it needed a city franchise, in addition to its state franchise granted by § 38-5-101, C.R.S., had nothing to appeal with respect to that aspect of the District Court's Order.

There is nothing in the authorities cited by Public Service, each of which involved a failure to preserve issues by Appellants, and not Appellees, which required Poudre to raise each of its defenses as an additional ground for affirmance in order to preserve them.

Public Service's argument that, to the extent the defenses raised solely questions of law, the Colorado Supreme Court could have ruled on them, overlooks the fact that many of Poudre's unresolved issues involved issues of fact, as to

which the District Court had not made findings of fact and conclusions of law.

Moreover, as just discussed, Poudre, as the prevailing party in the District Court, was not required to raise these additional grounds for affirmance in the Colorado Supreme Court because they had not yet been reached by the District Court.

Even assuming that Poudre as an Appellee had an obligation to advise the Colorado Supreme Court of the unresolved issues, it clearly did so. Public Service's argument about what the Colorado Supreme Court must have been thinking when it issued its opinion is based on the incorrect assumption that all the Colorado Supreme Court had before it was Public Service's out of context and incomplete quotations from Poudre's Brief and the Appendix thereto. As shown below, the Colorado Supreme Court had the entire record as well as Poudre's record citations to the unresolved defenses which clearly showed that the Federal Constitution had been invoked by Poudre.

For example, Public Service's Motion to Dismiss omits to quote the following language from page 29 of Poudre's Brief on Appeal before the Colorado Supreme Court:

> However, because of its ruling in Poudre Valley's favor, the District Court did not rule on any of the other issues raised by Poudre Valley as defenses other than the conspiracy defense.[17]

Footnote 17 on page 29 of Poudre's Brief on Appeal before the Colorado Supreme Court read as follows:

> For example, on the first day of trial the Court reserved ruling on the issues raised by Poudre Valley's Motion to Dismiss the City's Amended Complaint. Vol. 5, p. 19, line 16. For the Court's information, copies of some pages from the District

> Court describing these issues are attached hereto as Appendix VI. These materials and others reflecting unresolved defenses are found in the record as follows: Vol. 1, p. 79; Vol. 2, p. 346; Vol. 2, p. 494; Vol. 3, p. 863 (emphasis added).

The second and third record references in footnote 17 were to Poudre's Answer to Greeley's Complaint and its Answer to Home Light's Complaint in Intervention, which raised the defenses which are summarized at A56-58, and which Public Service concedes at page 7 of its Motion raised Federal Constitutional defenses.

The fourth record reference in footnote 17 (Vol. 2, p. 494) is to page 12 of Poudre's March 23, 1984 Summary Judgment Memorandum. At pages 12 and 13 of this Summary Judgment Memorandum, which is incorporated by reference at page 1 of the Trial Brief reproduced in part at Appendix VI to Poudre's Brief on Appeal, Poudre clearly repeated (what it had already alleged in its Answers, *see* ¶¶ 5 and 6 at A57) that the impairment issue was one of Federal Constitutional law:

> Granting the relief requested by the City and Home Light would unconstitutionally impair Poudre Valley's contract right obtained as a consequence of the franchise it has from the State in violation of Article I, Section 10 of the United States Constitution. See Russell v. Sebastian, 233 U.S. 195 (1914) (City ordinance adopted pursuant to a State Constitutional Amendment requiring a grant of permission from the city unconstitutionally impaired the contract rights of a utility who had built its facilities pursuant to a state grant of permission similar to the State franchise granted to Poudre Valley) (emphasis added).

Public Service's Motion to Dismiss also neglects to mention the following language found at page 17 of Poudre's Trial Memorandum (reproduced at Appendix VI to its Brief on

Appeal) which shows that the federal supremacy argument, in addition to being raised in the Answers, which are referred to by the second and third record references in note 17 of Poudre's Brief on Appeal (see ¶ 11 at A58), was also raised in the excerpt from the Trial Brief reproduced at Appendix VI to Poudre's Brief on Appeal:

> See also Public Utility District No. 1 of Pend Oreille County v. United States, 417 F.2d 200 (9th Cir. 1969) (Condemnation of an REA-financed utility violated the supremacy clause of the Constitution of the United States because "if, as a result of the condemnation, the loans to Inland were paid in full but the remaining portions of the system could not continue to operate with decent service and at decent rates, the Government would have been paid but the purpose of the Rural Electrification Act would have been frustrated." 417 F.2d at 201) (emphasis added).

Finally, Public Service's argument overlooks the fact that Poudre's entitlement to its "day in court" on its unresolved defenses, including those raising matters of state law, is itself a matter of federal due process.

II. PUBLIC SERVICE'S ARGUMENTS ON THE MERITS IGNORE CONTROLLING DECISIONS OF THIS COURT.

Public Service's argument that *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1, (1983) held that all state regulation of REA-financed utilities is permissible under the Supremacy Clause ignores the following language in that opinion:

> [A] particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans,

as to be implicitly pre-empted by the Rural Electrification Act.

461 U.S. at 389, 103 S.Ct. at 1915, 76 L.Ed. 2d at 13.

Public Service's argument that there is no supremacy issue because Poudre can continue to serve its existing customers ignores (1) the District Court's finding that granting the relief requested by Greeley "would prevent adequate service to rural territory in the vicinity of expanding cities" (emphasis added) (A26) and (2) the evidence (summarized in Poudre's Jurisdictional Statement at pages 8 and 9 and at note 10 on page 10) of Poudre's investment to prepare to serve the potential population which includes substantial growth subsequent to annexation.

Public Service's attempt to distinguish *Russell* v. *Sebastian*, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912 (1914) overlooks the cases cited at pages 21 and 22 of Poudre's Jurisdictional Statement.

Public Service's argument, on page 13 of its Motion to Dismiss, not only ignores *Russell* v. *Sebastian, supra*, but neglects to mention the fact that Article XXV of the Colorado Constitution was passed in 1954, 14 years after Poudre accepted the offer in §38-5-101, C.R.S., in 1940. *See City of Englewood* v. *Mountain States Telephone & Telegraph Co.*, 163 Colo. 400, 403-04, 431 P.2d 40, 42 (1967) for the effective date of Article XXV and page 22 of Poudre's Jurisdictional Statement for a description of the evidence showing Poudre accepted the offer in 1940.

Public Service also overlooks the fact that in *Russell* v. *Sebastian, supra*, the California Supreme Court had resolved the question as a matter of state law, but the state court construction of state law could not be sustained when the law had the effect of impairing the obligation of the state's contract with the utility created when the utility, like Poudre, built its facilities to provide utility service and therefore

accepted the state's offer. Moreover, in making its determination as a matter of Federal Constitutional law, this Court concluded in *Russell* v. *Sebastian, supra,* that, given the utility's preparation to serve, the only construction of California law was to permit the utility not only to maintain but extend its existing facilities. 233 U.S. at 208, 34 S.Ct. at 521-22, 58 L.Ed. at 923.

Public Service also mischaracterizes the holding in *City of Englewood, supra.* See Poudre's Jurisdictional Statement at pages 25 through 28.

Public Service's argument that the state can take Poudre's franchise from it without due process of law flies in the face of *Frost* v. *Corporation Commission,* 278 U.S. 515, 520, 49 S.Ct. 235, 237, 73 L.Ed. 483, 487 (1929), discussed at page 29 of Poudre's Jurisdictional Statement.

III. GREELEY CONCEDES POUDRE IS ENTITLED TO ITS "DAY IN COURT" ON ITS UNRESOLVED DEFENSES.

While Public Service argues (in note 3 at page 6 of its Motion to Dismiss) that the District Court is not free to consider Poudre's unresolved defenses, the thrust of Greeley's Motion to Dismiss is that the Colorado District Court is free to consider Poudre's unresolved defenses. Given this position, Greeley should have no objection to a remand by this Court for a consideration of these unresolved issues.

CONCLUSION

Contrary to the suggestion at page 15 of Public Service's Motion to Dismiss, Poudre is not asking for remand for the "taking of evidence." Rather, Poudre asks that, if this Court does not either summarily reverse or note probable jurisdiction, the matter be remanded to the Weld County District Court, so that the District Court can make findings of fact

and conclusions of law with respect to the evidence which is already before the Court.

Respectfully submitted,

KENNETH L. STARR
Counsel of Record
HOLMES & STARR
A Professional Corporation
717 17th Street, #2440
Denver, CO 80202
(303) 292-1500

Of Counsel
RANDOLPH W. STARR
RANDOLPH W. STARR, P.C.
221 East 29th St., #220
P.O. Box 642
Loveland, CO 80539
(303) 667-1029

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